

The record in this case consists of the pleadings filed by the parties and the orders by the Administrative Law Judge, as well as the transcript of the hearing held April 1, 1997, on claimant's Motion for Penalties.

### ISSUES

Respondent contends the Administrative Law Judge erred in awarding penalties following a hearing for which respondent and its insurance carrier were not given the proper notice. Respondent also asserts that the failure to give notice violates constitutional due process protections.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds that respondent was not given notice as required by statute and accordingly the Order for penalties must be set aside.

Claimant was awarded temporary total disability and medical benefits pursuant to an order dated December 10, 1996. As of March 3, 1997, respondent terminated these benefits, contending that claimant had not cooperated with the medical treatment being provided. On March 24, 1997, claimant mailed to respondent a Motion for Penalties based upon an earlier demand. Attached to the motion was a Notice of Hearing on the motion to be held on April 1, 1997. The motion and notice were received and filed in the Division of Workers Compensation on March 27, 1997.

Calculating the time in accordance with K.A.R. 51-17-1, the Administrative Law Judge found that the respondent was given the seven day notice as required by K.S.A. 44-534a for preliminary hearings. The Administrative Law Judge, therefore, proceeded to hear evidence presented by claimant and entered the current order for penalties. Respondent did not appear at the hearing.

The Appeals Board notes the notice would not have been adequate if the seven days were calculated in accordance with the principles discussed in McIntyre v. A.L. Abercrombie, Inc., 23 Kan. App. 2d 204, 929 P.2d 1386 (1996). In that case, the Court of Appeals applied K.S.A. 60-206(a) to calculate time limits of less than ten days. As a result, Saturdays, Sundays, and legal holidays are to be excluded from the days counted. In this case, the result would be that notice was not given seven days prior to the hearing.

However, the Appeals Board concludes that the hearing at issue in this case, hearing for penalties, is not a preliminary hearing and the seven day notice requirements in K.S.A. 44-534a would not apply. In this case, the penalties related to benefits ordered at a preliminary hearing. However, penalties may apply to any benefit order and the Board finds notice requirements of K.S.A. 44-534 more appropriate. This statute requires 20 days notice in any hearing "in regard to workers compensation benefits due the injured worker."

The Appeals Board, therefore, finds that proper notice was not given in this case. As a result, the Order must be set aside.

**WHEREFORE**, the Appeals Board finds that the Order by Administrative Law Judge John D. Clark, dated April 1, 1997, should be, and the same is hereby, reversed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October 1997.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Alexander B. Mitchell II, Wichita, KS  
Matthew S. Crowley, Topeka, KS  
John D. Clark, Administrative Law Judge  
Philip S. Harness, Director